

TONY BUCK,) Case No. CV 23-3115-RGK (JPR)
)
 Petitioner,)
)
 v.) ORDER SUMMARILY DISMISSING HABEAS
) PETITION
)
 BRIAN BIRKHOLTZ, Warden,)
)
 Respondent.)
 _____)

On April 24, 2023, Petitioner, who is housed at the U.S. Penitentiary at Lompoc, filed under 28 U.S.C. § 2241 a Petition for Writ of Habeas Corpus by a Person in Federal Custody.

In September 1995, Petitioner – looking for “cash sent through the mail” – robbed a postal worker at gunpoint and a week later with accomplices robbed and shot in the head a different postal worker. United States v. Buck, 23 F.4th 919, 922 (9th Cir. 2022). He was convicted in 1996 in the District of Arizona of two counts of assaulting a mail carrier with intent to steal mail under 18 U.S.C. § 2114(a), one count of attempted murder of a mail carrier under § 1114, and three counts of using a firearm during and in relation to a crime of violence under § 924(c)(1),

1 as well as an aiding-and-abetting charge. See id. at 922-23;
2 (see also Pet., ECF No. 1 at 2).¹ He was sentenced to a total
3 prison term of 510 months. Buck, 23 F.4th at 923. He appealed,
4 but the Ninth Circuit Court of Appeals affirmed the judgment.
5 See United States v. Buck, 133 F.3d 929 (9th Cir. 1997)
6 (unpublished). And the Supreme Court denied his petition for a
7 writ of certiorari. Buck v. United States, 524 U.S. 962 (1998).

8 In 2016, Petitioner filed in the District of Arizona a 28
9 U.S.C. § 2255 motion to vacate, set aside, or correct his
10 sentence. Buck v. United States, Nos. CV-16-02018-PHX-SRB (BSB)
11 & CR-95-00386-PHX-SRB, 2018 WL 6111787, at *1 (D. Ariz. Nov. 1,
12 2018), accepted by 2018 WL 6110938 (D. Ariz. Nov. 21, 2018),
13 aff'd, 23 F.4th at 919; (see Pet. at 2). He argued that "his
14 convictions for armed postal robbery under § 2114(a) were not
15 'crimes of violence' that triggered the application of § 924(c),
16 which imposes a mandatory consecutive term of imprisonment for
17 using or carrying a firearm 'during and in relation to any crime
18 of violence.'" Buck, 2018 WL 6111787, at *1 (quoting §
19 924(c)(1)(A)). The district court denied his § 2255 motion and a
20 certificate of appealability. Buck, 2018 WL 6110938, at *1.

21 Petitioner nonetheless appealed to the Ninth Circuit. (See
22 Pet. at 3.) In his September 7, 2021 Reply, he argued that under
23 Borden v. United States, 141 S. Ct. 1817 (2021) (plurality
24 opinion), § 2114 did "not meet either the force or intent
25 requirements of 924(c)(3)(A)" for a crime of violence because the
26 assault could be "based upon reckless or even negligent conduct."

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28 ¹ Throughout, the Court uses the pagination generated by its
Case Management/Electronic Case Filing system.

1 See Reply at 21, United States v. Buck, No. 18-17271 (9th Cir.
2 Sept. 7, 2021), ECF No. 61 at 25. The Ninth Circuit rejected the
3 Borden argument and affirmed:

4 Buck also argues that § 2114(a) is not a crime of
5 violence because it permits a conviction for merely
6 reckless conduct. See Borden, 141 S.Ct. at 1821-22
7 (plurality opinion). That is incorrect. Buck's jury
8 instructions mirrored the relevant language in § 2114(a),
9 and neither the instructions nor § 2114(a) contain any
10 suggestion that mere recklessness would suffice.

11 Instead, § 2114(a) requires intentional wrongdoing.
12 Buck's aggravated assault offense of conviction punishes
13 a person who "with intent to rob, steal, or purloin []
14 mail matter . . . puts [the victim's] life in jeopardy by
15 the use of a dangerous weapon." (emphasis added). The
16 intent requirement in the aggravated offense extends not
17 only to the robbery but also to the use of the dangerous
18 weapon. See Torres v. Lynch, 578 U.S. 452, 467, 136
19 S.Ct. 1619, 194 L.Ed.2d 737 (2016) ("In general, courts
20 interpret criminal statutes to require that a defendant
21 possess a mens rea, or guilty mind, as to every element
22 of an offense."); United States v. Sua, 307 F.3d 1150,
23 1154 (9th Cir. 2002) ("Traditionally, the mens rea of a
24 crime extends to each element of that crime.").

25

26 We therefore join every circuit to have addressed
27 the question – the Fourth, Fifth, Sixth, Seventh, and
28 Eleventh – in holding that an offender who assaults a

1 mail carrier with intent to steal mail, while placing the
2 mail carrier's life in jeopardy by the use of a dangerous
3 weapon, commits a crime of violence under § 924(c)(3)(A).
4 Buck, 23 F.4th at 929 (some alterations in original).

5 DISCUSSION

6 Generally, after a conviction and sentence are final, the
7 only mechanism for a federal prisoner to seek relief from
8 judgment is through § 2255. Tripati v. Henman, 843 F.2d 1160,
9 1162 (9th Cir. 1988). Prisoners may file only one § 2255 motion,
10 and only within certain strict time limits. See § 2255(f), (h).
11 Under the "savings clause" of § 2255, however, a prisoner may
12 file a federal habeas petition when it "appears that the remedy
13 by motion is inadequate or ineffective to test the legality of
14 his detention." § 2255(e). To qualify under that clause, a
15 petitioner must claim he is actually innocent and not have had an
16 "unobstructed procedural shot" at presenting the claim earlier.
17 Harrison v. Ollison, 519 F.3d 952, 959 (9th Cir. 2008).

18 The ban on unauthorized successive § 2255 motions does not
19 render § 2255 inadequate or ineffective. See Stephens v.
20 Herrera, 464 F.3d 895, 898 (9th Cir. 2006). When a federal
21 prisoner files a § 2241 petition, a district court must answer
22 the "threshold jurisdictional question" of whether the "petition
23 is properly brought under § 2241 or is, instead, a disguised
24 § 2255 motion." Marrero v. Ives, 682 F.3d 1190, 1194 (9th Cir.
25 2012).

26 Petitioner is not challenging the manner in which his
27 sentence is being executed but the legality of his § 924(c)
28 convictions. (See Pet. at 6.) The Petition's claim concerns §


1 2114(a) "NOT MEET[ing] THE ELEMENTS OF 924(c)(3)(A)" for a crime
2 of violence "AFTER BORDEN" because "the 2114(a) enhancement does
3 not require a defendant to have a specific mental state." (Id.
4 at 3.) But the Ninth Circuit already addressed his argument and
5 denied relief. See Buck, 23 F.4th at 929. Therefore, he does
6 not qualify for § 2255(e)'s "savings clause" because he can't
7 show that he has not had an unobstructed procedural shot at
8 raising the Petitioner's claim earlier. See Ivy v. Pontesso, 328
9 F.3d 1057, 1060 (9th Cir. 2003) (as amended) (for savings clause
10 to apply, petitioner "must never have had the opportunity to
11 raise [his claim] by motion"); see also Simmons v. United States,
12 No. ED CV 16-01503 MWF (AFM), 2016 WL 4059630, at *2 (C.D. Cal.
13 July 26, 2016) (holding that petitioner had "not shown she did
14 not have an unobstructed procedural shot" when she had already
15 presented same claims in unsuccessful § 2255 motion).

16 Section 2255 provides Petitioner a mechanism for seeking
17 leave to file a second or successive § 2255 motion, and it starts
18 in the Ninth Circuit. See Jones v. United States, 36 F.4th 974,
19 980 (9th Cir. 2022) ("[B]efore a person in federal custody can
20 file a second or successive motion in district court, § 2255(h)
21 requires that a court of appeals certify the motion."). But a
22 review of the Ninth Circuit's docket indicates that he apparently
23 has not asked for or received permission to bring his claim
24 again. See Harrison, 519 F.3d at 962 (petitioner could not
25 proceed with disguised successive § 2255 motion without order
26 from Ninth Circuit authorizing it (citing § 2244(b)(3)(A)).)
27 Because Petitioner's § 2241 Petition is a disguised successive §
28 2255 motion, it must be dismissed. Moreover, this Court is bound


by the Ninth Circuit's holding that Borden doesn't apply. See
Hart v. Massanari, 266 F.3d 1155, 1175 (9th Cir. 2001) ("district
 court bound by circuit authority . . . has no choice but to
 follow it"); see also Jones, 36 F.4th at 986 (holding that
 petitioner's Borden claim failed "to make a prima facie showing
 under § 2255(h) (2) because Borden did not announce a new
 'constitutional' rule" (quoting Ezell v. United States, 778 F.3d
 762, 766 (9th Cir. 2015))).

In sum, Petitioner has not shown that § 2255 is inadequate
 or ineffective as a means of providing him relief. His § 2241
 Petition is nothing but a disguised § 2255 motion. IT THEREFORE
 IS ORDERED that the Petition is dismissed and that Judgment be
 entered dismissing this action.²

DATED: **6/15/2023**


 R. GARY KLAUSNER
 U.S. DISTRICT JUDGE

Presented by:


 Jean Rosenbluth
 U.S. Magistrate Judge

² Local Rule 72-3.2 provides that "if it plainly appears
 from the face of the petition and any exhibits annexed to it that
 the petitioner is not entitled to relief, the Magistrate Judge
 may prepare a proposed order for summary dismissal and submit it
 and a proposed judgment to the District Judge."